

Appellant-Defendant Shane Hillebrand appeals following his guilty plea to and conviction for Failure to Stop After an Accident Resulting in Serious Bodily Injury, a Class D felony¹ for which he received a thirty-month sentence in the Department of Correction (“DOC”). Upon appeal, Hillebrand challenges his sentence by claiming that the trial court abused its discretion by eliciting evidence of and considering an improper aggravating factor. We affirm.

FACTS

According to the factual basis entered at the plea hearing, on May 5, 2007, in St. Joseph County, Hillebrand drove a vehicle which was involved in an accident resulting in serious bodily injury to a certain Tara Brown. Hillebrand knew that there was a high probability that somebody had been hurt in the accident. Hillebrand left the scene and did not immediately report the accident.

On September 14, 2007, the State charged Hillebrand with failure to stop after an accident resulting in serious bodily injury, a Class D felony. On October 30, 2007, Hillebrand pled guilty to that charge. During the February 13, 2008 sentencing hearing, Brown testified, in response to questions by the court, that she had suffered a broken pelvis and an injured knee in the accident and that she was in pain and believed Hillebrand should have observed his “obligation” as a “human being” to stop following the accident. Sentencing Tr. p. 27. The trial court entered judgment of conviction and imposed a sentence of thirty months in the DOC. This appeal follows.

¹ Ind. Code §§ 9-26-1-1; 9-26-1-8 (2006).

DISCUSSION AND DECISION

Hillebrand claims on appeal that the trial court abused its discretion in eliciting Brown's testimony and in considering it to be an aggravating factor. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). A trial court may abuse its discretion if its finding of aggravating and mitigating factors is not supported by the record, or if the trial court's sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or if the reasons given are improper as a matter of law. *See id.* at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id.* at 491.

Significantly, the trial court did not rely upon Brown's testimony in sentencing Hillebrand to thirty months in the DOC. Instead, the trial court based its enhanced sentence on Hillebrand's criminal history:

For me that is significant. A person who is on probation, probation is a great matter of grace, and the person is supposed to be abiding by all the conditions of probation and not committing new offenses. You had already failed to abide by one condition, albeit it's not the most egregious failure in the world although it is significant that we are concerned about probationers and drugs. . . .

But then this occurred while you were on probation. And for me to follow what your attorney asks and give you an eighteen-month sentence which is actually six months less than the sentence you're on probation on I find inappropriate to do. . . .

The last sentence was 24 months. I think when you violate the probation—when you're on probation and you commit a new offense of same class, albeit a different charge, I think it is appropriate to impose and I am now imposing a sentence of 30 months executed which will be consecutive to the sentence you are now serving.

Sentencing Tr. pp. 39-41. Hillebrand does not dispute the aggravator of his criminal history or the fact that he was on probation, and in violation of it, at the time of the instant crime.²

On the merits of his claim that the trial court abused its discretion in eliciting Brown's testimony, Hillebrand points to *Utley v. State*, 699 N.E.2d 723 (Ind. Ct. App. 1998), *trans. denied*. In *Utley*, this court held that a defendant convicted of failing to stop at the scene of an accident could not be ordered to pay restitution for the victim's funeral expenses. 699 N.E.2d at 729. In so holding, this court reasoned that restitution is properly payable to those suffering injury as a direct and immediate result of a defendant's criminal acts, that the defendant was not convicted of reckless homicide but rather leaving the scene of an accident, that the victim was an accident victim rather than the victim of a crime, and that no funeral costs were incurred as a result of the defendant's failure to stop. *Utley*, 699 N.E.2d at 729. Based upon this reasoning, Hillebrand argues that Brown was similarly an accident victim and that the trial court should not have permitted her testimony because she was not a victim of the instant crime.

Under Indiana Code sections 35-35-3-1 and -5 (2006), which permit victims to make

² To the extent Hillebrand argues that his guilty plea was entitled to more mitigating weight, the trial court no longer has the obligation to "weigh" aggravating and mitigating factors against each other when imposing sentence and cannot be said to have abused its discretion in failing to "properly weigh" sentencing factors. *Anglemyer*, 868 N.E.2d at 482, 491.

statements at sentencing hearings, and which Hillebrand argues are applicable,³ a “victim” is “a person who has suffered harm as a result of a crime.” *See* Ind. Code § 35-35-3-1. In contrast with restitution, which the *Utley* court determined was dependent upon the victim’s suffering injury as a *direct and immediate result* of the defendant’s criminal acts, here an individual must only demonstrate that she suffers harm as a result of a crime. 699 N.E.2d at 723 (emphasis supplied). Regardless of whether Brown would qualify for restitution under the *Utley* analysis, here she was only required to establish that she suffered harm as a result of Hillebrand’s leaving the scene in order to qualify as a victim eligible to participate in the sentencing hearing. Brown testified that, while she was lying on the ground in pain from a broken pelvis and other injuries, she observed Hillebrand leave the scene without concern for what she believed was his obligation to stop. This testimony demonstrates that she suffered harm as a result of Brown’s failure to stop, establishing that she was therefore a “victim” entitled to participate in his sentencing hearing pursuant to Indiana Code sections 35-35-3-1 and -5. Accordingly, to the extent that it was a factor in the trial court’s decision, we find no abuse of discretion in the trial court’s consideration of Brown’s testimony.

As for Hillebrand’s suggestion that the trial court was in error to question Brown, the record demonstrates that the trial court’s questioning was in an effort to avoid prejudice to Hillebrand rather than to cause it. Indeed, the trial court’s questions caused Brown to focus

³ The State argues that this definition is inapplicable because Hillebrand pled guilty without the benefit of a plea agreement. Although Indiana Code chapter 35-35-3 specifically governs plea agreements, section 35-35-3-5, which permits a victim to make a statement at the sentencing hearing, does not appear to be limited to only those sentencing hearings in which defendants plead guilty pursuant to a specific plea agreement. In any

her testimony on the harm she suffered as a result of Hillebrand's leaving the scene rather than on her presumably greater injuries caused by the accident itself. We find no error on this point. *See Griffin v. State*, 698 N.E.2d 1261, 1265 (Ind. Ct. App. 1998) (observing that a judge may question witnesses in order to promote clarity and dispel obscurity and that such questioning must be deemed harmful and prejudicial in order to constitute reversible error), *trans. denied*.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.

event, Hillebrand claims that section 35-35-3-1 is applicable, so we will base our analysis of his argument on that statute.